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Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *ALKIRE V. MUNICIPAL COURT*[1]

In *Alkire v. Municipal Court*, the Montana Supreme Court held that all interpreters for the deaf should be paid by the County, while other interpreters, such as translators—if requested by a public defender—should be paid by the Office of the State Public Defender. In so holding, the Court reconciled two conflicting Montana statutes.

In Missoula municipal court, prosecutors charged Timothy D. Alkire, a man suffering from serious hearing impairment, with criminal trespass to vehicles.[2] The Office of the State Public Defender, representing Alkire, filed a motion requesting a deaf interpreter.[3] The court determined that Alkire would need a "team of interpreters . . . for any trial held in this case."[4] Additionally, the court unearthed a statutory conflict regarding the payment of the interpreters.[5]

The court examined the two conflicting code sections: Montana Code Annotated Section 49–4–503 and Section 47–1–201(5)(a).[6] Section 49–4–503, enacted in 1979, provided that the court shall appoint a qualified interpreter to interpret the deaf person's testimony and to assist in trial preparation.[7] Under this statute, the fees for the interpreter "shall be paid out of the county general fund; and when the interpreter is otherwise appointed, the fees shall be paid out of funds available to the appointing authority."[8]

The second statute, Section 47–1–201(5)(a), enacted in 2005 as part of the statutes specifically creating the public defender system,[9] provided: "[T]he following expenses are payable by the [Office of the State Public

1. *Alkire v. Mun. Ct.*, 186 P.3d 1288 (Mont. 2008).

2. *Id.* at 1289.

3. *Id.*

4. *Id.* Alkire's deafness necessitated a "team of interpreters" because translation requires a high degree of concentration, precluding one interpreter from working for more than an hour at a time. *Id.* at 1290 n. 1; Bureau of Labor Statistics, *Occupational Outlook Handbook, 2008–09 Edition: Interpreters and Translators*, http://www.bls.gov/oco/ocs175.htm (last updated Dec. 18, 2007).

5. *Id.* at 1289–1290.

6. *Id.*

7. Mont. Code Ann. § 49–4–503 (2007).

8. *Id.* at § 49–4–509.

9. *Alkire*, 186 P.3d at 1290 n. 2.

Defender] if the expense is incurred at the request of a public defender: (a) witness and interpreter fees and expenses . . . ."[10]

In grappling with whether interpreters should be paid by county funds or by the Office of the State Public Defender, the municipal court held that the 2005 statute superseded the older statute.[11] The court reasoned that the legislature, presumptively aware of the older statute, had implicitly repealed it in cases where a deaf indigent criminal defendant had been appointed a public defender.[12] Thus, the municipal court ordered that the Office of the State Public Defender bear the costs of the interpreters.[13]

The Supreme Court disagreed and reversed the municipal court's ruling for two reasons. The Court stated that first, the municipal court erroneously determined the legislature's implicit repeal of the earlier statute, and second, the municipal court failed to reconcile the two statutes.[14]

The Court noted the legislature "is presumed to act with knowledge of existing law."[15] Thus a legislative act would only implicitly overrule an earlier statute if the two were "clearly and irreconcilably inconsistent."[16] Moreover, implicit repeal of a statute is not favored in Montana.[17] Common law and statutory authority require courts to "giv[e] effect" to both statutes, where possible.[18]

Applying this interpretation, the Court ruled the Office of the State Public Defender shall pay the expense of interpreters or translators requested by public defenders, except for interpreters for the deaf appointed by a court.[19] Therefore, the Office of the Public Defender will pay for the general appointment of interpreters and translators, pursuant to the 2005 statute Section 26–2–506(2)(a), whereas the county will pay for all interpreters for deaf parties, pursuant to the 1979 statute Section 49–4–503.[20]

The Court, in reconciling the statutes, noted the legislature might wish to settle the issue of payment in the 2009 legislative session.

— *K.V. Aldrich*

10. Mont. Code Ann. § 47–1–201(5)(a).
11. *Alkire*, 186 P.3d at 1289–1290.
12. *Id.* at 1290.
13. *Id.*
14. *Id.* at 1291.
15. *Id.* (citations omitted).
16. *Id.* (citing *Ross v. City of Great Falls*, 967 P.2d 1103, 1106 (Mont. 1998)).
17. *Id.* (citations omitted).
18. *Alkire*, 186 P.3d at 1291; Mont. Code Ann. § 1–2–101.
19. *Alkire*, 186 P.3d at 1291.
20. *Id.*

II. *MONTANA V. PARK*[21]

A defendant's failure to object to a sentence at the time of sentencing generally precludes the defendant from objecting on appeal, but the Montana Supreme Court has carved out an exception to this rule.[22] Recently, in *Montana v. Park*, the Montana Supreme Court revisited this exception and, by broadly interpreting a sentencing statute, refused to apply the exception and declined to consider the objection on appeal.[23] The Court found that because a sentence forbidding a defendant from possessing alcohol was within statutory parameters and thus merely objectionable, but not illegal, the exception to the waiver rule did not apply.[24]

On June 13, 2001, the defendant, Dawn Park, caused a vehicle accident on U.S. Highway 93 near Florence, Montana, while under the influence of prescription drugs.[25] According to witnesses, the defendant collided with another vehicle from behind.[26] The victim, Elaine Zawada, died from injuries she sustained in the wreck.[27]

One witness reported that, before the accident, the defendant nearly collided with the witness several times.[28] Another observer stated that, while he was traveling between 60 and 65 miles per hour, the defendant passed him, swerved across both the centerline and rumble strips before attempting to pass the victim's car.[29] While attempting to pass the victim's car, the defendant swerved back into the right lane and hit the victim's vehicle from behind.[30] The impact caused the victim's car to spin into a ditch and roll.[31]

After the accident, a blood sample given by the defendant revealed a blood concentration of 0.18 milligrams per liter (mg/l) of the prescription painkiller Hydrocodone.[32] According to the crime lab, a blood concentration of 0.20 mg/l is lethal for most people.[33] The defendant eventually pleaded *nolo contendere* to felony negligent homicide.[34]

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21. *Mont. v. Park*, 198 P.3d 321 (Mont. 2008).
22. *Mont. v. Lenihan*, 602 P.2d 997 (Mont. 1979).
23. *Park*, 198 P.3d 321.
24. *Id.* at 324.
25. *Id.* at 322.
26. *Id.*
27. *Id.* at 323.
28. *Id.* at 322.
29. *Park*, 198 P.3d at 322.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 323.

The district court ordered a Pre-Sentencing Investigation report (PSI) to aid at sentencing.[35] The PSI showed that at the time of the accident the defendant suffered from numerous physical and emotional problems, and was being treated with several pain medications, as well as an antidepressant.[36] After the accident, the defendant entered a residential treatment program and subsequently underwent outpatient psychological treatment.[37]

During sentencing, the district court considered the PSI and the defendant's own statements in determining the conditions to impose during probation.[38] The defendant stated that she used alcohol only moderately, but the court found medical evidence contradicting that statement.[39] As a condition of her probation, the district court imposed numerous conditions, including a prohibition on alcohol possession while the defendant received treatment for her medical and psychological problems.[40] The district court sentenced the defendant to five years in the Montana Department of Corrections, and then on August 14, 2002, moved the defendant into a pre-release program.[41] The court suspended the sentence with certain conditions.[42] The defendant agreed that she would "not drink or possess any alcoholic beverages."[43] The district court also imposed drug and alcohol testing.[44] After completing an Intensive Supervision Probation program, the defendant was placed on standard probation on May 22, 2003.[45]

On July 25, 2007, the State petitioned to have the defendant's suspended sentence revoked based on two violations related to alcohol abuse.[46] First, during a drug test, the defendant submitted toilet water in place of her urine sample in an attempt to hide her alcohol use.[47] Second, on July 20, 2007, police officers found the defendant "in an extremely intoxicated state crawling through the bushes in a parking lot in Stevensville."[48] A breathalyzer determined her blood alcohol content to be 0.128.[49]

As a result of the violations, the district court revoked the defendant's suspended sentence and remanded her to the Department of Corrections to

35. *Park*, 198 P.3d at 323.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Park*, 198 P.3d at 323.
42. *Id.*
43. *Id.* (internal quotations omitted).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Park*, 198 P.3d at 323.
48. *Id.*
49. *Id.*

serve the remainder of the five-year sentence, subject to the same conditions mandated in the first judgment.[50] The district court also ordered the defendant to undergo a chemical-dependency assessment and to comply with any recommendations resulting from the assessment.[51]

The defendant appealed the district court's decision, first on the grounds that the condition prohibiting her from drinking or possessing alcohol was illegal because it fell "outside the statutory parameters," and second, because the restriction had "no nexus to either the offense or herself."[52]

The Montana Supreme Court, reviewing the legality of the sentencing conditions *de novo*,[53] concluded that, because the challenged condition was not illegal, the defendant's nexus argument should have been raised at sentencing.[54] Because she did not raise this objection at sentencing, the defendant waived her objection to the sentencing condition; therefore, the Court refused to consider the nexus argument on appeal.[55]

In rejecting the defendant's nexus argument on appeal, the Court refused to apply the exception set out in *Montana v. Lenihan*.[56] *Lenihan* set out an exception to the standard waiver rule "by allowing appellate review of an allegedly illegal sentence even when the defendant raised no objection to the sentence at trial."[57]

The Court narrowed this exception in *Montana v. Kotswicki*, holding that a challenged sentence that "falls within the parameters of [the pertinent sentencing statute] . . . is not an illegal sentence for the purposes of invoking the *Lenihan* rule."[58]

In *Park*, the Court ruled the defendant's sentence was not illegal because it was within the statutory parameters of Montana Code Annotated Section 46–18–201(4)(o).[59] The Court explained that the statute allows a sentencing judge to place upon a defendant any "reasonable" condition during the suspended sentence.[60] This allows the sentencing judge to impose any conditions "considered necessary for rehabilitation or for the protection of the victim or society."[61]

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50. *Id.* at 324.
51. *Id.*
52. *Id.*
53. *Park*, 198 P.3d at 324.
54. *Id.*
55. *Id.* at 325.
56. *Id.* at 324.
57. *Id.* (citing *Lenihan*, 602 P.2d at 1000).
58. *Mont. v. Kotswicki*, 151 P.3d 892, 894 (Mont. 2007).
59. *Park*, 198 P.3d at 324.
60. *Id.*
61. *Id.*

The Court also found that when a sentencing court does not follow statutory constraints, the sentence imposed is objectionable, but not necessarily illegal, and therefore does not invoke the *Lenihan* exception.[62]

Ultimately, the Court relied on *Kotswicki* and its progeny in concluding that the Court would not consider the defendant's appeal because the challenged conditions fell within the statutory framework, making them objectionable, but not illegal.[63] Because the Court found that the challenged condition was not illegal, the defendant should have objected to the condition at sentencing.[64] She did not, and therefore waived appellate review of the issue.[65]

Throughout the *Lenihan* line of cases, the Court has articulated competing, realistic concerns. As an explanation for its decision, the *Lenihan* Court stated:

> As a practical matter, [raising an objection for the first time on appeal] may be a defendant's only hope in cases involving deferred imposition of sentence. If a defendant objects to one of the conditions, the sentencing judge could very well decide to forego the deferred sentence and send him to prison. To guard against this possibility, a defendant often times remains silent even in the face of invalid conditions.[66]

However, in *Koswicki*, the Court supported its decision by stating that appellate review of merely objectionable sentences not objected to at sentencing would "encourage silence during the sentencing process."[67] As pointed out by Justice Nelson in his dissent in *Koswicki*, taken together with *Lenihan* and its progeny, the *Koswicki* decision "creates further confusion and uncertainty in an already muddled *Lenihan* jurisprudence."[68] While Park does not create a crystal-clear rule on this issue, it illustrates the Montana Supreme Court's move toward narrowing the *Lenihan* exception to the waiver rule.

Practitioners should therefore raise any objections to a sentence at the sentencing, especially if the sentence could be construed to fall within statutory parameters, rather than risk waiving the objection for appeal.

— *Kari Cluff*

62. *Id.*
63. *Id.*
64. *Id.*
65. *Park*, 198 P.3d at 324.
66. *Lenihan*, 602 P.2d at 1000.
67. *Koswicki*, 151 P.3d at 895.
68. *Id.* at 902.

III. *OBERSON V. UNITED STATES DEPARTMENT OF AGRICULTURE*[69]

The Ninth Circuit certified three questions concerning Montana snowmobile operator liability statutes to the Montana Supreme Court. Consistent with prior case law, the Court denied these landowners immunity for their negligent and intentional acts and held them to an ordinary degree of care. The Court, also consistent with prior case law, protected the ability to recover damages for the participants of those sports.

In February 1996, Brian Musselman and three of his friends—Patrick Kalahar, Tim Johnson, and Jaime Leinberger—were riding snowmobiles at night on the Big Sky Trail.[70] The Big Sky Trail is "maintained by the Forest Service on Forest Service land, outside West Yellowstone, Montana."[71] While snowmobiling, "the group came upon a sudden, unmarked, steep decline in the trail."[72] Although Musselman was able to safely negotiate the hill, Johnson did not.[73] Musselman stopped his snowmobile, dismounted, and began to walk across the trail.[74] At the same time, Kalahar and Leinberger roared over the hill at approximately 55 miles per hour, and one of their snowmobiles "struck Musselman in the head, causing him catastrophic brain injuries."[75]

Musselman's "entire life was involved with snowmobiles."[76] Prior to his accident, he was an "expert snowmobiler who had been inducted into the Michigan Snowmobile Hall of Fame."[77] After the accident, he was helpless and "unable to care for himself in any manner, confined to feeble grunting and interminable days of expensive medical care and treatment."[78]

Lori Oberson, as legal guardian of Musselman, brought a federal suit against the Forest Service under the Federal Tort Claims Act (FTCA),[79] alleging the Forest Service negligently "failed to correct or warn of the danger posed by the hill" and this negligence "was the proximate cause of Musselman's injuries."[80]

The Federal Court for the District of Montana applied Montana law "to determine the substantive law governing Oberson's FTCA claim."[81] The

69. *Oberson v. U.S. Dept. of Agric.*, 171 P.3d 715 (Mont. 2007).
70. *Id.* at 718.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Oberson*, 171 P.3d at 718.
76. *Oberson v. U.S.*, 311 F. Supp. 2d 917, 923 (D. Mont. 2004) [hereinafter *Oberson I*].
77. *Id.*
78. *Id.*
79. *Oberson*, 171 P.3d at 718; *see also* 28 U.S.C. § 2674 (2007).
80. *Oberson*, 171 P.3d at 718.
81. *Id.*

Forest Service argued the Montana snowmobile liability statute, which states "a snowmobile area operator has no duty to eliminate, alter, control, or lessen the risk inherent in the sport of snowmobiling," relieved it from any duty to warn of the hazardous hill.[82] The district court rejected this affirmative defense and concluded "the hill at issue was not one of the risks inherent in the sport of snowmobiling."[83]

Also, the district court refused to apply the "gross negligence standard found in the snowmobile liability statutes."[84] Instead, it relied on *Brewer v. Ski-Lift, Inc.*, in which the Montana Supreme Court found a similar provision relating to ski area operators in violation of the Equal Protection Clause of Montana's Constitution.[85] Furthermore, the district court refused to apply the "willful or wanton" conduct standard from the Montana recreational use statutes "in place of the gross negligence provision in the snowmobile liability statute."[86] The court reasoned that "the more specific snowmobile liability statute preempted the willful and wanton standard . . . [and] in the absence of any other governing statute, it would apply the catch-all 'ordinary care' standard found at Section 27–1–701."[87] The district court applied this standard and apportioned "40% of the responsibility to the Forest Service, 10% to Musselman, and 50% to Kalahar and Leinberger jointly."[88]

The Forest Service appealed the determination of negligence to the United States Court of Appeals for the Ninth Circuit.[89] However, pursuant to Rule 44(c) of the Montana Rules of Appellate Procedure, the Ninth Circuit certified three questions to the Montana Supreme Court:[90]

> Does the gross negligence standard of care in the snowmobile liability statute, Mont[ana] Code Ann[otated] [Section] 23–2–653 (1996), violate the Montana equal protection clause, Mont[ana] Const[itution] art[icle] II, [Section] 4?
>
> If the snowmobile liability statute's gross negligence standard is unconstitutional, does the recreational use statute's willful or wanton misconduct stan-

82. *Id.* (citing Mont. Code Ann. § 23–2–653(3) (1995)).

83. *Id.* (citing *Oberson I*, 311 F. Supp. 2d at 959) (quotations omitted).

84. *Oberson*, 171 P.3d at 718 (citing Mont. Code Ann. §§ 23–2–651, 23–2–653, 23–2–654); *Oberson I*, 311 F. Supp. 2d at 957–958.

85. *Oberson*, 171 P.3d at 718 (citing *Brewer v. Ski-Lift, Inc.*, 762 P.2d 226 (Mont. 1988); Mont. Const. art. II, § 4); *Oberson I*, 311 F. Supp. 2d at 957–958.

86. *Oberson*, 171 P.3d at 718 (citing Mont. Code Ann. §§ 60–16–301, 60–16–302); *Oberson I*, 311 F. Supp. 2d at 956.

87. *Oberson*, 171 P.3d at 718; *Oberson I*, 311 F. Supp. 2d at 956. Montana Code Annotated Section 27–1–701 states, "[e]xcept as otherwise provided by law, everyone is responsible not only for the results of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has willfully or by want of ordinary care brought the injury upon himself."

88. *Oberson*, 171 P.3d at 718; *Oberson I*, 311 F. Supp. 2d at 959–960.

89. *Oberson*, 171 P.3d at 717.

90. *Id.*

> dard of care, Mont[ana] Code Ann[otated] [Section] 70–16–302(1) (1996), apply in its place?
>
> If neither the snowmobile liability statute nor the recreational statute provide an applicable standard of care, does the ordinary care standard, Mont[ana] Code Ann[otated] [Section] 27–1–701, apply?[91]

The Montana Supreme Court began by briefly stating the standard of review to examine whether or not a statute violates the Montana Constitution. A court "presume[s] that all statutes are constitutional, and . . . attempt[s] to construe them in a manner that avoids unconstitutional interpretation."[92] Furthermore, the party challenging a statute must prove "beyond a reasonable doubt[ ] that the statute is unconstitutional."[93]

The Court examined Montana's snowmobile liability statute in light of its holding in *Brewer*.[94] In *Brewer*, the plaintiff was skiing and sustained injuries when he fell on an inverted tree stump, out of sight under the snow.[95] The district court granted summary judgment to the ski area owner based on the skier responsibility statutes, which barred a skier's "recovery from a ski area operator if the skier suffers any risk inherent in the sport of skiing."[96] These risks included variations in the terrain and collisions with an object while skiing.[97]

The *Brewer* Court found that the statute provided injured skiers with no redress for any injuries sustained, regardless of whether the ski area operator was negligent.[98] As a result, the statute "classif[ied] skiers . . . differently than those who engage in other sports activities which are inherently dangerous. The statutes require skiers alone to assume the risk of injury."[99] Moreover, the statute provided ski area operators "certain rights not enjoyed by other recreational businesses."[100] The Court found this statute overbroad because it not only covered risks inherent in skiing, but also actions caused by the negligent—or even intentional—actions of the operator.[101] Finally, this statute was not rationally related to the legislative intent to protect the economic vitality of the ski industry, which contradicted the legislative mandate of Montana Code Annotated Section 27–1–701, "which

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91. *Id.* at 717–718.
92. *Id.* at 719 (quoting *Mont. v. Trull*, 136 P.3d 551, 557 (Mont. 2006)) (quotations omitted).
93. *Id.*
94. *Id.* at 719–720.
95. *Brewer*, 762 P.2d at 227.
96. *Id.*
97. *Id.* (citing Mont. Code Ann. § 23–2–736 (1987)).
98. *Id.* at 228.
99. *Id.*
100. *Id.*
101. *Brewer*, 762 P.2d at 230.

holds a person responsible for an injury resulting from his want of ordinary care."[102]

In *Oberson*, the Montana Supreme Court found the snowmobile liability statute's purpose "closely mirrors the skier responsibility statute's statement of purpose," which was to protect "[snowmobile area operators] from frivolous lawsuits and liability over which the operator has no control."[103] Thus the Court held the statute's gross negligence standard of care "bears no rational relationship to this purpose" under the *Brewer* analysis.[104]

The Court rejected the Forest Service's argument that the Legislature is justified in treating snowmobiling different from skiing and all other dangerous sports (such as horseback riding and hiking) because of the unique motorized equipment and the high speeds of snowmobiles.[105] In addition, the Forest Service claimed the Legislature was "concerned with the economic well being of snowmobiling as it has a major effect on the state's economy."[106] The Court examined the classifications at issue in *Brewer*, which treated skiers differently "than those who engage in other sports activities which are inherently dangerous," and found no difference between the purposes of the skier responsibility statute at issue in *Brewer* and the snowmobile liability statute at issue here.[107]

The Court also rejected the Forest Service's attempt to distinguish *Brewer* by claiming the snowmobile liability statute allows some recovery from the snowmobile area operator, whereas the skier responsibility denied all recovery.[108] The Court held, as in *Brewer*, the statute was overbroad and effectively immunized the snowmobile area operators from liability for their own negligence.[109]

The Court was left to determine what standard of care should apply in place of the statute's gross negligence standard.[110] The Forest Service argued if the snowmobile statute is declared unconstitutional, the recreational use statute should provide the governing standard of care because it is the "next most specific statute with respect to snowmobilers and snowmobile area operators."[111] The recreational use statute applies to landowners who allow individuals to use their land, free of charge, for recreational uses.[112]

102. *Id.*
103. *Oberson*, 171 P.3d at 719 (citing *Brewer*, 762 P.2d at 230) (brackets in original).
104. *Id.*
105. *Id.* at 719–720.
106. *Id.* at 720.
107. *Id.*
108. *Id.*
109. *Oberson*, 171 P.3d at 720.
110. *Id.* at 721.
111. *Id.*
112. *Id.* (citing Mont. Code Ann. § 70–16–302(1) (1995)).

The landowner is liable to such individuals based on the landowner's own willful or wanton misconduct.[113]

The Court rejected the Forest Service's reasoning because the Court only invalidated the gross negligence standard of the statute, leaving intact the remainder of the statute, "including those provisions in Section 23–2–653(1) and (3)," which describe the duties of the snowmobile area operator.[114] The Court stated "a statute is not destroyed in toto because of an improper provision unless such provision is necessary to the integrity of the statute or was the inducement to its enactment."[115] The Court held that removal of the gross negligence standard did not destroy the integrity of the liability statute "in light of the fact that the legislature amended the statute in 1999," after the federal district court held that the gross negligence standard violated the equal protection clause pursuant to *Brewer*.[116] The amended version contained a general negligence standard.[117]

The Court's determination of the appropriate standard in *Oberson* is similar to *Mead v. M.S.B., Inc.*, where the Court was forced to determine what duty of care applied to ski area operators when the skier responsibility statute did not enumerate a particular standard.[118] The Court determined the proper standard of care was that of ordinary care as set forth in Montana Code Annotated Section 72–1–701. The *Mead* Court reasoned that any other interpretation would render the statute unconstitutional based on its decision in *Brewer*.[119] Likewise, the *Oberson* Court held the general statutory duty of ordinary care provided the correct standard of care for "the Forest Service's actions in this case."[120]

Justice Leaphart concurred in the result but objected to the standard of "beyond a reasonable doubt" for constitutional challenges.[121] He found this standard to be "an incongruous standard to apply" to a question of law, "as opposed to a question of fact."[122] Justice Leaphart proposed that the Court adopt a standard to invalidate "a legislative enactment only upon a plain showing by the challenger that the legislation in question lacks a rational basis."[123] However, he maintains that the State's burden will change de-

113. *Id.* (citing Mont. Code Ann. § 70–16–302(1)).

114. *Id.*

115. *Oberson*, 171 P.3d at 721 (quoting *Mont. Auto. Assn. v. Greely*, 632 P.2d 300, 311 (Mont. 1981)).

116. *Id.*

117. *Id.*

118. *Mead v. M.S.B., Inc.*, 872 P.2d 782, 786 (Mont. 1994).

119. *Id.*

120. *Oberson*, 171 P.3d at 722.

121. *Id.* (Leaphart, J., concurring).

122. *Id.* at 723.

123. *Id.*

pending on the level of scrutiny necessary to resolve a particular constitutional challenge.[124]

Justice Rice dissented. He took issue with the majority's rational basis review of the snowmobile liability statute. He argued that the Court must give the Legislature "every possible presumption . . . in favor of the constitutionality of a legislative act."[125] Justice Rice stated the majority failed to do this and instead jumped "straight to the conclusion" that because the snowmobile liability statute's purpose "closely mirrors" the skier responsibility statute invalidated in *Brewer*, the same must be true in this case.[126]

Justice Rice opined that the Legislature had a rational reason to treat snowmobiling differently than other sports because of the unique dangers inherent *only* in snowmobiling.[127] The decision to classify certain outdoor recreational activities as more dangerous than others is the "province of the legislature, not this Court."[128]

Justice Rice also disagreed with the Court's reliance on *Brewer*.[129] In *Brewer*, "an essential component to the holding [was the] Court's finding that the skier liability statute eliminated *all* duties a ski area operator owes to its users."[130] This is not the case here, because the Legislature only limited, not eliminated, the duties the snowmobile area operator owed to its users.[131] Thus because there were avenues for compensating injured snowmobilers, "a proper rational basis review clearly distinguishes *Brewer* and clearly satisfies the rational basis test."[132]

Despite this dissent, the Montana Supreme Court has consistently denied legislative power to grant immunity to landowners allowing inherently dangerous activities on their premises for their negligent and intentional acts. Instead, the Court has protected recovery for the participants of those sports and has read in a duty of ordinary care.

— *Annie DeWolf*

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124. *Id.*

125. *Id.* (Rice, J., dissenting) (quoting *Powell v. St. Compen. Ins. Fund*, 15 P.3d 877, 881 (Mont. 2000)).

126. *Oberson*, 171 P.3d at 724.

127. *Id.* at 725.

128. *Id.*

129. *Id.* at 724.

130. *Id.*

131. *Id.*

132. *Oberson*, 171 P.3d at 724.

IV. *TIN CUP COUNTY WATER V. GARDEN CITY PLUMBING & HEATING, INC.*[133]

A plaintiff with a breach of contract claim must establish causation through the testimony of qualified expert witnesses.[134] In *Tin Cup*, the Montana Supreme Court held that expert testimony was required to establish causation in a breach of contract case where Tin Cup alleged that Garden City's unfinished grouting of the Tin Cup dam caused a leak and extensive damage.[135] Yet, despite Tin Cup's attempt to establish causation through expert testimony, the Court affirmed the exclusion of the expert witnesses because they were inadequate and their testimony did not establish that it was "more likely than not" that Garden City caused Tin Cup's damages.[136]

Tin Cup maintains and operates the Tin Cup dam in the Selway-Bitterroot Wilderness through a special use permit issued by the United States Forest Service.[137] The dam supplies water to approximately 100 farmers near Darby, Montana.[138] Beginning in the 1950s, the United States government began issuing reports documenting the deterioration of the dam and crumbling of the dam's outlet system.[139] Eventually, both the Forest Service and the State of Montana declared the dam a "high hazard."[140]

On March 25, 1997, Tin Cup hired Druyvestein, Johnson & Anderson (DJA) to engineer the replacement of the dam's outlet conduit pipe.[141] DJA determined that crews would need to slip-line the old outlet conduit with a high-density polyethylene (HDPE) pipe and grout and seal the gap between the new pipe and the existing outlet conduit.[142]

The Forest Service approved the project and issued Tin Cup an additional special use permit to access and replace the pipeline.[143] Under the terms of the permit, Tin Cup was solely responsible for the dam's safety and bore liability for up to $1,000,000 in damages.[144]

Tin Cup contracted separately with Garden City Plumbing & Heating for the construction of the project.[145] Though DJA prepared the contract

133. *Tin Cup Co. Water v. Garden City Plumbing & Heating, Inc.*, 200 P.3d 60 (Mont. 2008).
134. *Id.*
135. *Id.* at 69.
136. *Id.* at 70.
137. *Id.* at 63.
138. *Id.*
139. *Tin Cup*, 200 P.3d at 63.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 64.
144. *Id.*
145. *Tin Cup*, 200 P.3d at 64.

between Tin Cup and Garden City, it was not a party to that contract.[146] DJA had a separate contract with Tin Cup for construction, administration services, and geotechnical investigation.[147]

During construction, Garden City found unexpectedly large voids within the masonry conduit that caused the crew to deplete the grout at the site.[148] Garden City decided not to grout the final eight to ten feet of the conduit—a decision which was approved by DJA, as demonstrated in its letter to Tin Cup on December 1, 1997, reporting successful completion of phase I of the project.[149]

On May 4, 1998, Tin Cup officials discovered seepage on the downstream side of the dam next to the new outlet pipe.[150] Tin Cup and the Forest Service sent divers down to investigate the cause of the seepage on June 6, 1998, and they discovered that Garden City had not completely grouted the conduit.[151] The Forest Service paid Garden City $500,000 to fix the dam, and then sued Tin Cup for $1,000,000.[152]

After settling with the Forest Service, Tin Cup sued DJA and Garden City, alleging breach of contract, bad faith arising from a special relationship with DJA, professional negligence, and indemnification.[153] Both DJA and Garden City filed motions for summary judgment on a multitude of issues,[154] as well as motions in limine to exclude Tin Cup's proposed expert witnesses.[155] After oral argument on the motions in limine, Tin Cup attempted to submit two supplemental expert disclosures, but the district court denied the disclosures because they were untimely and prejudicial to the defendants.[156] As a consequence, the district court ultimately granted Garden City's motion in limine to exclude expert testimony and their summary judgment motion based on Tin Cup's failure to prove causation.[157] Tin Cup appealed.[158]

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146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Tin Cup*, 200 P.3d at 64.

152. *Id.*

153. *Id.* at 64–65.

154. Both DJA and Garden City filed motions for summary judgment and argued Tin Cup's claim was barred by the statute of limitations because the complaint was grounded in tort rather than contract. Thus, the three-year statute of limitations applied instead of the eight-year statute of limitations. *Id.* at 65–66; see also Mont. Code Ann. §§ 27–2–202(1), 27–2–204(1) (2005).

155. *Tin Cup*, 200 P.3d at 65.

156. *Id.*

157. *Id.* The Court also granted DJA's motion for summary judgment based on the application of the three-year statute of limitations. *Id.*

158. *Id.*

First, the Montana Supreme Court affirmed the district court's determination that Tin Cup failed to prove causation.[159] The district court granted summary judgment for Garden City because Tin Cup's causation argument lacked support by material evidence or expert opinion showing proximate cause.[160] Several government witnesses testified as to the cause of the 1998 dam leak, but nobody verified that the leak would not have occurred "but for" Garden City's allegedly inadequate grouting.[161] Garden City, however, had two experts testify that the unfinished grouting was not the root cause of the leak.[162] Tin Cup argued that no expert testimony was needed because the documentary record clearly showed that the unfinished grouting caused the leak, and the issue was not beyond common experience.[163] The Court, however, held Tin Cup was required to provide expert testimony because the issue of Garden City's causation involved complex issues beyond common experience, such as dam engineering, the dam's structural history, and dam safety.[164]

Next, the Court determined that the district court properly excluded the testimony of Tin Cup's expert witnesses.[165] Tin Cup's experts were James Bush, a civil engineer who Tin Cup "engaged . . . to interpret contract documents," and Peter Aberle, a grouting expert.[166] Bush was not allowed to testify because he had no specialized experience with dams and did not prepare Tin Cup's expert disclosure.[167] Aberle's testimony, on the other hand, was limited because he was not a dam expert, had never been to the dam site in question, and was not informed of the dam's history.[168] Aberle testified that he was only qualified to discuss the pulling of HDPE pipe and the grouting operation;[169] therefore, the district court limited his testimony to those areas.[170]

In response to these exclusions, Tin Cup offered only conclusory statements that the experts had special training and education upon which to base their opinions.[171] Tin Cup also pointed to testimony of Garden City, DJA, and the government's experts to try to establish a genuine issue of

159. *Id.* at 68.
160. *Id.*
161. *Tin Cup*, 200 P.3d at 68.
162. *Id.*
163. *Id.* at 69.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Tin Cup*, 200 P.3d at 69.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 70.

material fact.[172] The Court again affirmed the district court in holding that Tin Cup's conclusory assertions regarding its experts did not raise genuine issues of material fact as to causation.[173]

The Court's ruling in Tin Cup strictly applied the rule that expert testimony is required to establish causation in cases where the alleged wrongdoing is not the obvious cause of damages. Also notable is the Court's holding that experts are properly excluded if their testimony does not explicitly meet the "more likely than not" causation standard. Tin Cup serves as a reminder to Montana practitioners that their expert witnesses must both explicitly establish causation and hold sufficient knowledge on the issues surrounding their testimony; mere conclusions wrapped in the guise of expertise are not enough.

— *Katy Furlong*

V. *MONTANA v. COTTERELL*[174]

In *Montana v. Cotterell*, the Montana Supreme Court held that an "innocent" aerial fly-over by law enforcement personnel did not constitute a search under the Montana or United States Constitutions.[175] The Court went on to conclude that Cotterell had no privacy expectation in his radio conversations, the search warrant issued for his property was supported by probable cause, and the search warrant provided for the seizure of hunting evidence.[176] Although the Court's validation of warrantless fly-overs might raise privacy concerns among some Montana practitioners, the Court was careful to note that the decision was limited to the specific facts of the case.[177]

On October 1, 2004, two administrators for the Montana Department of Fish, Wildlife, and Parks (FWP) were flying back to Helena from a meeting in Bozeman when they sighted a suspicious hunting stand.[178] They circled back for another look, noticing a game feeder and salt block container nearby.[179] Each independently reported the incident to the FWP enforcement division.[180]

172. *Id.*
173. *Tin Cup*, 200 P.3d at 70.
174. *Mont. v. Cotterell*, 198 P.3d 254 (Mont. 2009).
175. *Id.* at 262 (citing U.S. Const. amend. IV; Mont. Const. art. II, § 11).
176. *Id.* at 262, 264, 266, 268.
177. *Id.* at 261.
178. *Id.* at 257.
179. *Id.*
180. *Cotterell*, 198 P.3d at 257.

On October 7, a FWP game warden, Chris Anderson, traveled to the property to investigate.[181] Once there, his access was precluded by a gated fence and "no trespassing" signs.[182] Anderson observed the property from the road, the Missouri River, and an adjoining property to which he had been given permission to enter in the past.[183] From his observations, Anderson concluded that the purpose of the salt tray was to bait game. He subsequently identified the owner of the property as Cotterell.[184]

On October 24, Anderson returned to observe the property and monitored radio airwaves to determine if any hunters in the area were violating the Montana law prohibiting use of two-way radios to hunt big game.[185] He intercepted and recorded conversations that related to hunting strategies.[186] By observing the actions of Cotterell and his son on the property, Anderson determined that they were the recorded offenders.[187]

On October 25, Anderson returned and observed Cotterell cross the Missouri River onto private property to examine a dead buck.[188] Anderson photographed Cotterell taking the buck to his property on his off-highway vehicle without tagging the animal.[189] Anderson then obtained a warrant and executed a search of Cotterell's property.[190] There he found both whitetail and mule deer parts.[191] Cotterell stated that he had shot a whitetail doe and whitetail buck.[192] After Anderson informed him of his observations, Cotterell admitted that he had shot two bucks and tagged one with a doe tag.[193] As for the mule deer, Cotterell claimed that his son and grandson shot them on his property.[194] It was later discovered that the mule deer permits held by Cotterell's son and grandson were not valid for Cotterell's property district.[195] A subsequent warrant for Cotterell's residence was executed, and the search turned up the buck and tagged doe.[196]

Ultimately, Anderson's investigation showed that Cotterell had violated Montana's limits in 2002 and 2003.[197] He further discovered that in

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*; Mont. Code. Ann. § 87–1–125 (2003).
186. *Cotterell*, 198 P.3d at 257–258.
187. *Id.*
188. *Id.* at 258.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Cotterell*, 198 P.3d at 258.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*; Mont. Code Ann. § 87–3–103.

both years, Cotterell had not obtained proper permits and licenses for the game he had killed.[198] In total, Cotterell was charged with eight counts.[199] Three were for violating the legal game limit, one for hunting without a license, one for possession of unlawfully killed game, one for using two-way radio devices while hunting, one for hunting without landowner permission, and one for possessing unlawfully taken wildlife.[200] He was convicted on seven of the counts and he appealed to the Montana Supreme Court.[201]

The Court consolidated Cotterell's appeal into three issues:[202] first, whether Cotterell's motion to suppress the evidence gathered as a result of Anderson's investigation should have been granted;[203] second, whether Cotterell's motion to dismiss should have been granted;[204] third, whether the district court erred in sentencing Cotterell.[205]

On the motion to suppress, Cotterell argued that the state investigation was fatally flawed from the start because the warrantless fly-over by FWP personnel constituted an illegal search.[206] Further, he argued that the investigation by Anderson required an illegal trespass onto private land,[207] the monitoring of his radio communications violated his privacy,[208] and the basis for the warrant lacked probable cause.[209]

As to the fly-over by FWP personnel, the Court held that no search had occurred under either the Montana or United States Constitutions.[210] The Court noted that the observations were innocent, occurred outside of any law enforcement duties, and were made by the naked eye from a vantage point outside of Cotterell's property.[211] Relying on *California v. Ciraolo*, the Court held that although Cotterell had posted his property to prohibit trespass, the officers were free to make any observations of items not "protected from view."[212]

The Court refused to consider Cotterell's claim that Anderson had illegally trespassed on private land without the owner's consent.[213] In the mo-

198. *Cotterell*, 198 P.3d at 258.
199. *Id.*
200. *Id.* (citing Mont. Code Ann. §§ 87-3-103, 87-3-112, 87-3-118, 87-3-304, 87-1-125).
201. *Id.* at 259.
202. *Id.* at 257.
203. *Id.* at 257, 259.
204. *Cotterell*, 198 P.3d at 257.
205. *Id.*
206. *Id.* at 259.
207. *Id.* at 262.
208. *Id.* at 262-263.
209. *Id.* at 259.
210. *Cotterell*, 198 P.3d at 262.
211. *Id.* at 261-262.
212. *Id.* at 262 (citing *Calif. v. Ciraolo*, 476 U.S. 207, 213 (1986)).
213. *Id.*

tion to suppress, Cotterell alleged that Anderson trespassed on his land to make incriminating observations.[214] On appeal, Cotterell changed his theory arguing that Anderson trespassed on a neighbor's private land without authority.[215] The Court held that the failure to raise this argument in district court precluded Cotterell from raising it on appeal.[216] The Court also declined to address this argument under the plain-error doctrine.[217] More than Cotterell's "mere assertion that failure to review the claimed error may result in a manifest miscarriage of justice" was necessary to trigger that doctrine.[218]

As to the radio conversations, Cotterell argued that he had a reasonable expectation of privacy in his conversations and that the recordings of them required a warrant.[219] Applying the factors set out in *Montana v. Goetz*,[220] the Court examined whether Cotterell had an actual expectation of privacy that society was willing to recognize as reasonable and the nature of the state's intrusion.[221] The Court rejected the assertion that Cotterell had an actual expectation of privacy.[222] Rather than attempt to keep his activities away from "prying eyes," Cotterell had broadcast his actions on a radio whose frequency could be monitored by any member of the public who had access to commonly available monitoring equipment.[223] He could not have been surprised that his illegal hunting conversations might have been overheard by Anderson.[224] As a result, the Court held that Anderson did not need a warrant to listen to, or record, those conversations.[225]

The Court also rejected Cotterell's argument that the warrant used to search his property was not supported by sufficient probable cause.[226] Considering the totality of the circumstances, the Court found that the facts included in the application were sufficient to indicate a fair probability that evidence of a crime would be found on Cotterell's property.[227] The key

214. *Id.*
215. *Id.*
216. *Cotterell*, 198 P.3d at 262.
217. *Id.* (citing *Mont. v. Mackrill*, 191 P.3d 451, 463 (Mont. 2008)).
218. *Id.*
219. *Id.* at 263–264.
220. *Mont. v. Goetz*, 191 P.3d 489, 497–498 (Mont. 2008) ("We determine whether a state action constitutes an "unreasonable" or "unlawful" search or seizure in violation of the Montana Constitution by analyzing three factors: 1) whether the person challenging the state's action has an actual subjective expectation of privacy; 2) whether society is willing to recognize that subjective expectation as objectively reasonable; and 3) the nature of the state's intrusion.").
221. *Cotterell*, 198 P.3d at 263 (citing *Goetz*, 191 P.3d at 497–498).
222. *Id.* at 264.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 266.
227. *Cotterell*, 198 P.3d at 266.

facts identified by the Court were: Anderson's personal observations on four separate occasions, observance of Cotterell's actions matching the intercepted radio conversations, Cotterell crossing the river onto private property, and Anderson's prior experiences as a warden that led him to believe that Cotterell would be storing evidence of his crimes on the property.[228] Ultimately, the Court found these facts sufficient to show probable cause.[229]

The Court rejected Cotterell's assertion that the search warrant was "overly-broad" and should have resulted in suppression.[230] Specifically, Cotterell alleged that the language "[a]ny other evidence of a crime" should not have allowed agents to seize journals and calendars that detailed previous game kills.[231] Although the Court agreed that the language was "overly-broad" and had to be excised, it further stated that in the event a warrant is issued lawfully and is particularized, only evidence seized pursuant to the "overly-broad" language had to be suppressed.[232] Based upon that finding and the plain-view doctrine set forth in *Montana v. Loh*, the Court determined that the calendars and journals were items that a warden would seek in a hunting investigation, the warrant was lawful, all of the items were found in places authorized by the warrant, and the items were found while searching for other items explicitly set forth in the warrant.[233] As a result, the Court excised the "any other evidence of a crime" language, but determined that the journals and calendars were still within the scope of the warrant.[234]

The Court determined that the denial of Cotterell's motion to dismiss was not in error.[235] The fly-over by FWP personnel did not constitute a search under either the Montana or United States Constitutions.[236] Cotterell had no expectation of privacy for his public radio conversations.[237] There was sufficient probable cause to support the warrant used to seize evidence from Cotterell's property.[238] Finally, the warrant still supported the seizure of all evidence even with the "overly-broad" clause excised.[239]

Although the Court was careful to note that the FWP personnel were not conducting an intentional surveillance and were not on duty at the time they flew over Cotterell's property, this case is notable for the questions it

228. *Id.* at 265.
229. *Id.* at 266.
230. *Id.* at 268.
231. *Id.* at 267.
232. *Id.* at 268 (quoting *Hague v. Dist. Ct.*, 36 P.3d 947, 950 (Mont. 2001)).
233. *Cotterell*, 198 P.3d at 268 (citing *Mont. v. Loh*, 914 P.2d 592, 600 (Mont. 1996)).
234. *Id.*
235. *Id.*
236. *Id.* at 262.
237. *Id.* at 264.
238. *Id.* at 266.
239. *Cotterell*, 198 P.3d at 268.

raises. The Montana practitioner should be aware that it is unclear what the Court might determine if a purported search occurs while law enforcement personnel are engaging in other official duties. Furthermore, the Court's decision on aerial surveillance, coupled with its language on the common availability of radio monitoring devices, raises the question of permissible surveillance in an age when the common household computer provides increasing access to satellite imagery to the public.

— *Andres Haladay*

VI. *TARLTON V. KAUFMAN*[240]

Private nuisance is the use of one's property to the detriment of the use and enjoyment of another's property.[241] However, "[i]t is well-settled throughout the country that, standing alone, unsightliness, or lack of aesthetic virtue, does not constitute a private nuisance."[242] Nevertheless, a minority of jurisdictions, including Oregon and Massachusetts, allow a cause of action for aesthetic nuisance.[243] With the Montana Supreme Court's decision in *Tarlton v. Kaufman*, a case of first impression, Montana has joined the minority.[244]

Tarlton involved a dispute between adjoining landowners in the rural community of Lolo, Montana.[245] In 2005, the Tarltons installed mercury vapor yard lights on their property.[246] The Kaufmans alleged that the lights disturbed the natural beauty of the rural setting, prevented Mr. Kaufman from practicing his hobby of astronomy, and interfered with Mrs. Kaufman's sleep.[247] Following the Kaufmans' multiple requests to install

240. *Tarlton v. Kaufman*, 199 P.3d 263 (Mont. 2008).

241. *Wernke v. Halas*, 600 N.E.2d 117, 120 (Ind. App. 1st Dist. 1992) (citing *Cox v. Schlachter*, 262 N.E.2d 550, 553 (Ind. App. 1st Dist. 1970)).

242. *Id.* at 121–122 (citing *Haehlen v. Wilson*, 54 P.2d 62 (Cal. App. 3d Dist. 1936); *Allson v. Smith*, 695 P.2d 791 (Colo. App. 1984); *B & W Mgt. Inc. v. Tasea Inv. Co.*, 451 A.2d 879 (D.C. 1982); *Jillson v. Barton*, 229 S.E.2d 476 (Ga. App. 1975); *Bader v. Iowa Metro. Sewer Co.*, 178 N.W.2d 305 (Iowa 1970); *Mahlstadt v. City of Indianola*, 100 N.W.2d 189 (Iowa 1959); *Ness v. Albert*, 665 S.W.2d 1 (Mo. App. W. Dist. 1983) (*transfer to Mo. denied*); *Crabtree v. City Auto Salvage Co.*, 340 S.W.2d 940 (Tenn. App. 1960); *Vt. Salvage Corp. v. Village of St. Johnsburg*, 34 A.2d 188 (Vt. 1943); *Mathewson v. Primeau*, 395 P.2d 183 (Wash. 1964)).

243. *See generally e.g. Hay v. Stevens*, 530 P.2d 37 (Or. 1975). Oregon applies an extremely strict standard in such cases. "The standard must necessarily be that of definite offensiveness, inconvenience or annoyance to the normal person in the community—the nuisance must affect the ordinary comfort human existence as understood by the American people in the present state of enlightenment." *Id.* at 39. The Massachusetts Supreme Court has long recognized that aesthetic considerations, standing alone, could support limitations on the use of land. *Rattigan v. Wile*, 841 N.E.2d 680, 689 (Mass. 2006).

244. *Tarlton*, 199 P.3d at 273.

245. *Id.* at 265.

246. *Id.*

247. *Id.*

shields over the lights, Bob Tarlton installed a shield on one of the lights.[248] This did not appease the Kaufmans, and in 2006, the Kaufmans began constructing a massive fence—the subject of this dispute.[249]

The newly-constructed fence stands 20 feet above a six-foot-high berm, measures 270 feet in length and is covered in dark material.[250] While the Tarltons argued the fence was a "spite fence," the Kaufmans claimed the purpose of the fence was to block the glare from the Tarltons' yard lights.[251]

The Tarltons sued, setting out two counts in their complaint.[252] Count I alleged that, pursuant to Montana Code Annotated Section 27–30–101,[253] the fence constituted a nuisance because it reduced their property value, obstructed their view, and was an "eyesore."[254] Count II alleged that the fence was a "spite fence."[255] The Tartlons sought injunctive relief and prayed for punitive damages.[256] The Kaufmans counterclaimed that the Tarlton's yard lights constituted a nuisance because the lights interfered with their hobbies, disturbed wildlife, and interfered with the general use and enjoyment of their property.[257]

Prior to trial, the parties submitted numerous jury instructions disputing the definition of nuisance.[258] After a three-day trial, a unanimous jury found that: 1) the Kaufmans' fence did not constitute a nuisance; 2) the fence was not a spite fence; 3) the Kaufmans were not required to remove their fence; and 4) the Tarltons' lights were not a nuisance.[259] The jury, unable to find legal grounds to bring resolution to the matter, found a unique way to add pragmatism and common sense to its verdict. After reading the verdict, the foreperson stated:

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248. *Id.*

249. *Id.*

250. *Tarlton*, 199 P.3d at 265.

251. *Id.* at 266.

252. *Id.*

253. "Anything which is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or which unlawfully obstructs the free passage or use is a nuisance." Mont. Code Ann. § 27–30–101(1) (2007).

254. *Tarlton*, 199 P.3d at 266.

255. *Id.* A spite fence is an exception to the general rule that unsightliness, or aesthetic virtue, fails to establish the requisite elements for a private nuisance. Under the modern American rule, one may not lawfully erect a structure that serves no useful purpose other than to annoy one's neighbors. *Haugen v. Kottas*, 37 P.3d 672, 674 (Mont. 2001) (quoting *Sundowner, Inc. v. King*, 509 P.2d 785, 786–787 (Idaho 1973)).

256. *Tarlton*, 199 P.3d at 266.

257. *Id.*

258. The district court chose Instruction 13, proposed by the Kaufmans, which included the following statement: "*Generally*, a structure or condition cannot constitute a nuisance merely because it is unsightly or because it obstructs a party's view." *Id.* at 267 (emphasis added).

259. *Id.*

> Although we did not find legal grounds to find the fence or the lights a nuisance, we the jury strongly and unanimously recommend the following:
> 1) The Tarltons should replace the mercury lights with modernized lights satisfactory to both parties; AND THEN
> 2) The Kaufmans [should] take their fence down.[260]

Both parties appealed the district court's ruling on various procedural motions;[261] however, the noteworthy issue on appeal was whether the district court erred by instructing the jury that "*generally*, a structure or condition cannot constitute a nuisance merely because it is considered unsightly or because it obstructs a party's view."[262] The Tarltons argued this instruction (Instruction 13) is contrary to Montana's definition of nuisance, which states "*anything* which is injurious to health, indecent or offensive to the senses or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance."[263]

The Supreme Court concluded the district court erred by allowing Instruction 13, which used the word "generally" instead of "anything."[264] Because Montana's statutory definition of nuisance is broad, the Court reasoned "generally" was an unreasonably limiting instruction that misled the jury.[265] The Court said:

> In the absence of any factually relevant case law in support of limiting nuisance on the basis of both unsightliness and view obstruction, and in light of Montana's expansive statutory definition of nuisance, we conclude that the limitations on unsightliness and view obstruction articulated in Instruction 13 were inaccurate statements of the law.[266]

There are two important aspects to the Court's reasoning. First, the Court emphasized that Montana's broad definition of nuisance is the result of legislative intent and the Court was not at liberty to interpret it otherwise.[267] Second, the Court expressly distinguished this case from *McCollum v. Koloktrones*,[268] noting that the statement in *McCollum* (which would seem to prohibit a cause of action for aesthetic nuisance) was essentially dicta.[269] The Court then remanded the case on the nuisance issue.[270] In doing so, the Court has signaled its willingness to treat aesthetic nuisance claims as valid causes of action.

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260. *Id.* (emphasis in original).
261. *Id.* at 266.
262. *Tarlton*, 199 P.3d at 266 (emphasis added).
263. *Id.* at 268 (emphasis added).
264. *Id.*
265. *Id.*
266. *Id.* at 269.
267. *Id.* at 270.
268. *Tarlton*, 199 P.3d at 169 (citing *McCollum v. Koloktrones*, 311 P.2d 780 (Mont. 1957)).
269. *Id.* at 269.
270. *Id.* at 273.

The majority's decision, however, failed to recognize the practical problems associated with the parties' positions. Justice Morris's dissent poetically articulated the dual "prisoner's dilemma presented in this case."[271] The Tarltons had no guarantee that upon modernizing their 175-watt "barn beacons," the Kaufmans would remove their fence.[272] Similarly, the Kaufmans had no guarantee that if they removed their fence first, the Tarltons would remove their yard lights.[273]

Historically, courts have declined "to hold the unsightly or visually aesthetically displeasing aspects of a neighbor's property as an actionable nuisance" claim.[274] The public policy behind this general rule is that a landowner has the right to do as he or she pleases with his or her private property and that judges should not rely upon "subjective notions of ugliness to interfere with that right."[275] It is not the task of the courts to enjoin an activity merely because it results in visual discomfort or annoyance.[276] Justice Day of the Colorado Supreme Court opines that aesthetic determinations are not a task for courts because, "in our populous society, the courts cannot be available to enjoin an activity solely because it causes some aesthetic discomfort or annoyance. Given the myriad of disparate tastes, life styles, morals and attitudes, the availability of a judicial remedy for such complaints would cause inexorable confusion."[277]

The Montana practitioner should take note that the Montana Supreme Court has opened the door to nuisance claims based solely on aesthetics. Typically, in nuisance cases, courts apply the Restatement test balancing the utility of conduct against the gravity of harm.[278] However, it remains unclear if Montana will apply this traditional balancing test to the newly recognized aesthetic nuisance claims. Indeed, it will be difficult to determine whether the gravity of harm resulting from an "eyesore" is extreme enough to warrant relief.

— *Helia Jazayeri*

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271. *Id.* at 273 (Morris, J., dissenting).

272. *Id.*

273. *Id.* at 273.

274. Stephen E. Woodbury, *Aesthetic Nuisance: The Time Has Come To Recognize It*, 27 Nat. Resources J. 877, 878 (1987).

275. *Id.*

276. *Wernke*, 600 N.E.2d at 122.

277. *Green v. Castle Concrete Co.*, 509 P.2d 588, 591 (Colo. 1973) (en banc).

278. *Restatement (Second) of Torts* § 829 (1979) (stating "[a]n intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant and the actor's conduct is (a) for the sole purpose of causing harm to the other; or (b) contrary to common standards of decency").

VII. *MONTANA V. TEETS*[279]

Montana practitioners and lower courts should heed the Montana Supreme Court's new "nexus" requirement when imposing probation conditions. In *Montana v. Teets*, the Montana Supreme Court upheld a lower court's issuance of probation conditions that (a) prohibit the defendant from possessing alcohol, (b) prohibit him from entering places where intoxicants are the principal items sold, and (c) require him to submit to alcohol testing.[280] The Court held that these conditions had a sufficient nexus to the defendant's underlying drug-related offense.[281]

Following a motorcycle accident that severely injured his leg, Aaron Teets fraudulently altered his doctor's prescription from 50 Percocet narcotic pain pills to 160 pills.[282] The pharmacist noticed the forgery, and confronted Teets, who claimed that his doctor increased the prescription's quantity to help him overcome the extreme pain he was experiencing.[283] The pharmacist reported the forgery to the Flathead County Sheriff's Office. Teets was subsequently charged with, and pled guilty to, fraudulently obtaining dangerous drugs, in violation of Montana Code Annotated Section 45–9–104(3).[284] Ultimately, Teets received a two-year deferred sentence subject to the following probation conditions: he was prohibited from possessing alcohol or entering places where intoxicants were the principal items sold, and was required to submit to alcohol testing.[285]

In his pre-sentence report, Teets claimed that he had been alcohol-free until his 21st birthday, that he had an occasional drink with dinner, and that he was by no means an abuser of drugs.[286] Even though the pre-sentence report revealed Teets had no criminal record, the district court was skeptical of Teets's claim that he did not have substance-abuse problems.[287] The Court cited three previous occasions of deceit by Teets: once when claiming his friend altered the prescription, once when denying that he forged the prescription, and once when denying that he tried to pass the prescription at the pharmacy.[288] The district court, recognizing that it could not impose alcohol restrictions as "standard" conditions, concluded that an alcohol restriction was appropriate because "an offense that involves the abuse of

279. *Mont. v. Teets*, 183 P.3d 45 (Mont. 2008).
280. *Id.* at 47.
281. *Id.*
282. *Id.* at 46.
283. *Id.*
284. *Id.*
285. *Teets*, 183 P.3d at 46.
286. *Id.*
287. *Id.*
288. *Id.*

chemicals is appropriately connected with use of alcohol."[289] The Montana Supreme Court, in *Montana v. Brotherton*, ruled that so-called "standard" or "stock" conditions—alcohol, gambling, and casino restrictions—may not be mandatorily imposed on the offender, but may still be imposed if they have a sufficient nexus to the offender or the offense charged.[290]

On review, Teets challenged the legality of the conditions, arguing they were imposed as standard conditions even though they had no connection to his underlying offense and the state failed to present evidence demonstrating past alcohol abuse.[291] The Montana Supreme Court, citing the appropriate standard of review in cases involving the legality of the probation conditions, first examined the legality of the probation condition, and then reviewed such conditions for abuses of discretion.[292]

The Court noted Montana's sentencing statutes, which grant courts the authority to impose conditions of probation that are "reasonable restrictions" necessary to rehabilitate the offender, to protect society, or to protect the victim.[293] Citing *Montana v. Ashby*, the Montana Supreme Court reaffirmed its nexus requirement that sentencing courts may impose conditions of probation that sufficiently relate either to the underlying offense or to the offender.[294] In *Ashby*, the Montana Supreme Court found an insufficient nexus to support an alcohol prohibition on the defendant charged with issuing a bad check.[295]

Overturning the district court's alcohol restrictions, the *Ashby* Court relied on the fact that no evidence indicated that the defendant's offense was related to alcohol, nor was the alcohol restriction likely to protect society by reducing the likelihood of bad checks.[296] Specifically, the defendant did not use alcohol while committing the crime, and he did not commit the crime to pay for alcohol or drugs.[297] Moreover, the pre-sentencing investigation revealed no history of drug or alcohol abuse.[298] In contrast, the *Ashby* Court upheld the district court's issuance of a gambling restriction because the defendant had a history of financial irresponsibility.[299] In upholding the gambling condition, the Court reasoned that it was necessary to rehabilitate the defendant so that he could learn to manage his finances.[300]

289. *Id.*
290. *Mont. v. Brotherton*, 182 P.3d 88, 92 (Mont. 2008).
291. *Teets*, 183 P.3d at 46.
292. *Id.*
293. *Id.*; *see* Mont. Code Ann. § 46–18–201(4) (2007).
294. *Teets*, 183 P.3d at 46 (citing *Mont. v. Ashby*, 179 P.3d 1164, 1167 (Mont. 2008)).
295. *Ashby*, 179 P.3d at 1168.
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.* at 1168–1169.

Additionally, relying on *Montana v. Winkel*, the Court reaffirmed that a sufficient nexus exists between alcohol-related probation conditions and underlying drug-related offenses.[301] In *Winkel*, the defendant was charged with felony and misdemeanor drug possession charges.[302] Although alcohol played no role in the crime, the Montana Supreme Court upheld the lower court's alcohol restriction because the defendant had a DUI conviction and his use of other intoxicants was both recent and chronic.[303] The alcohol restriction thus had a sufficient nexus to both rehabilitate the offender, and protect society.[304]

Relying on *Ashby* and its progeny, the Montana Supreme Court held that the alcohol-related conditions imposed on Teets were legal conditions because they had a sufficient nexus to the offense of fraudulently obtaining dangerous drugs.[305] Moreover, the Court upheld the conditions based on the public policy outlined in Montana Code Annotated Section 46–18–201(4), which authorizes the imposition of conditions that rehabilitate the lawbreaker and protect society.[306]

Because offender rehabilitation and protecting society from drug and alcohol abusers are important goals for Montana practitioners and courts, alcohol and drug-related probation conditions will be upheld so long as they have a sufficient nexus to either the offender or the offense charged. As this case demonstrates, alcohol-related conditions may be upheld as legal conditions even when the state cannot prove that the lawbreaker is a past abuser of drugs or alcohol.

— *Aaron Neilson*

VIII. *FISHER V. SWIFT TRANSPORTATION COMPANY, INC.*[307]

The Montana Supreme Court's decision in *Fisher v. Swift Transportation Company, Inc.* distorted the concept of foreseeability in Montana tort law. The decision greatly expanded the class of potential plaintiffs to whom an allegedly negligent defendant owes a legal duty of care, and essentially eliminated legal determination of causation in all intervening cause cases. The decision will likely affect tort defendants and plaintiffs for years to come.

301. *Teets*, 183 P.3d at 46–47 (citing *Mont. v. Winkel*, 182 P.3d 54, 56 (Mont. 2008)).
302. *Winkel*, 182 P.3d at 54–55.
303. *Id.* at 56.
304. *Id.*
305. *Teets*, 183 P.3d at 47.
306. *Id.*
307. *Fisher v. Swift Transp. Co., Inc.*, 181 P.3d 601 (Mont. 2008).

The multiple events that gave rise to the lawsuit in *Fisher* occurred on Interstate 15 in the Sieben Flats, north of Helena, Montana, on April 28, 2004.[308] A severe storm hit the area that morning.[309] Icy roadways and poor visibility forced many motorists to pull their vehicles to the side of the interstate and wait for the conditions to improve.[310] Plaintiff, Montana State Highway Patrol officer Wade Fisher, was called to investigate an accident near mile marker 213; dispatch informed Fisher that a Pepsi semi-truck had side-swiped two vehicles that were parked on the side of the interstate.[311] Upon arriving at the scene, Fisher activated his emergency lights, parked his patrol car diagonally across the lanes of Interstate 15, and began investigating the crash.[312]

Twenty minutes into Fisher's investigation, a second semi-truck, owned and operated by defendant Swift Transportation, slowly approached the accident scene.[313] The Swift truck slid on the icy interstate, and the driver could not prevent the truck from sliding into the side of Fisher's patrol car and a passenger vehicle parked behind it.[314] Because Montana Highway Patrol protocol prevented Fisher from investigating an accident involving his own patrol car, he called Sergeant Larry Irwin to investigate the second accident.[315] Co-defendant J & D Truck Repair was also called to tow the Swift truck (which had come to rest against the two vehicles it contacted) away from Fisher's patrol car and the second vehicle.[316]

Over an hour after the second accident, J & D arrived on the scene and prepared to tow the Swift truck.[317] At that time, Officer Fisher was in the passenger's seat of his patrol car finishing paperwork related to the first accident.[318] The J & D employees connected their winch line to the Swift trailer and pulled the trailer away from the cars, ultimately setting it four to five feet from Fisher's patrol car.[319] Despite the high winds and icy roads, one J & D employee removed the winch line from the Swift truck while the other instructed Fisher to move his vehicle from the accident scene.[320] Fisher walked around to the driver's side of his vehicle and inspected the

308. *Id.* at 605.
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Fisher*, 181 P.3d at 605.
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Fisher*, 181 P.3d at 605.
320. *Id.*

damage.[321] As Fisher examined the damage to his patrol car, the Swift trailer slid back across the ice and pinned Fisher against his vehicle.[322] The J & D employees re-attached the winch and freed Fisher within a couple of minutes.[323] Fisher was treated at a local hospital for crush-type injuries and was later released.[324]

Fisher filed suit against Swift and J & D, alleging that Swift's negligence in causing the accident and J & D's negligence in executing the towing operation caused his injuries.[325] Swift filed a motion for summary judgment, arguing that Fisher's injuries were unforeseeable as a matter of law and that Fisher could not establish either the duty or causation elements of his negligence claim.[326] While the district court rejected Swift's duty argument, finding that Fisher was a foreseeable plaintiff, it granted Swift partial summary judgment on the matter of causation. The court held that Fisher's injuries were unforeseeable as a matter of law.[327] Fisher appealed the district court's grant of partial summary judgment, and Swift cross-appealed the district court's denial of summary judgment as to the duty element of Fisher's negligence claim.[328]

On appeal, Justice Leaphart, writing for the majority, first addressed the defendant's duty of care. Existence of a legal duty in Montana "turns primarily on foreseeability."[329] Montana has adopted Justice Cardozo's opinion in the famous case of *Palsgraf v. Long Island Railroad Company*[330] when analyzing foreseeability in the context of duty.[331] Essentially a defendant owes a duty to foreseeable plaintiffs with respect to those risks that make the defendant's conduct unreasonably dangerous.[332] A person is a foreseeable plaintiff "if she or he is within the foreseeable zone of risk created by the defendant's negligent act."[333]

After identifying the applicable law, the majority determined that Swift owed Fisher a legal duty of care. First the Court concluded that Swift owed Fisher a duty of care imposed by the motor vehicle statutes of the

321. *Id.* at 605–606.
322. *Id.* at 606.
323. *Id.*
324. *Id.*
325. *Fisher*, 181 P.3d at 606.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* at 607.
330. *Palsgraf v. Long Is. R.R.*, 162 N.E. 99 (N.Y. 1928). In *Palsgraf*, Cardozo stated that "the risk reasonably to be perceived defines the duty to be obeyed." *Id.* at 100.
331. *Fisher*, 181 P.3d at 607 (citing *Mang v. Eliasson*, 458 P.2d 777, 781 (Mont. 1969)).
332. *Id.*
333. *Id.*

Montana Code Annotated.[334] The Court then determined that Swift owed Fisher a common law duty as well.[335] The Court reasoned that the zone of risk created by the Swift driver's alleged negligence extended beyond other drivers in the truck's immediate vicinity and included anyone at the accident scene.[336] Although it passed out of the control of Swift's driver over an hour before Fisher was injured, the Court found it significant that Fisher was in fact injured by the Swift truck.[337] The Court discounted the manner in which Fisher's injuries occurred and held that because Fisher was a foreseeable plaintiff, in this case a motorist, who was within the zone of risk (the accident scene) created by the Swift driver's alleged negligence, his specific injury need not be foreseen.[338] Consequently, Swift owed him a duty of care as a matter of law.[339]

After determining that Swift owed Fisher a legal duty of care, the Court used a tortured analysis to conclude that the district court erred in granting partial summary judgment to Swift on the issue of causation. To establish causation in Montana "intervening cause" cases, a plaintiff must prove that the defendant's actions were both a cause-in-fact and a proximate cause of his injuries.[340] While cause-in-fact is established under the "but-for" test, a plaintiff proves proximate cause by showing that the defendant's actions "foreseeably and substantially caused his injury."[341] Under Montana's proximate cause analysis, an intervening act does not sever the defendant's liability if the intervening act is reasonably probable or reasonably anticipated under the circumstances.[342] Although normally an issue of fact, the foreseeability of an intervening cause may be determined as a matter of law where reasonable minds can reach but one conclusion.[343]

Applying the proximate cause analysis, the majority determined that Fisher's injury, which occurred more than an hour after the accident and was directly caused by J & D's negligence, could be a foreseeable result of the Swift driver's allegedly negligent driving on poor roadway conditions.[344] Finding that the Swift driver could have foreseen the subsequent

334. *Id.*; *see* Mont. Code Ann. §§ 61-8-302, 61-8-303(4), 61-8-346(3) (2007).

335. *Fisher*, 181 P.3d at 607.

336. *Id.*

337. *Id.* at 608. When comparing the present matter to the facts in *Palsgraf*, the Court stated "Mrs. Palsgraf was struck by the scales, not by the bomb itself. By contrast, Fisher *was* struck by the Swift truck itself—not by an aimless butterfly, a set of scales, or any other intervening object." *Id.*

338. *Id.*

339. *Id.*

340. *Fisher*, 181 P.3d at 609.

341. *Id.*

342. *Id.* at 610.

343. *Id.*

344. *Id.*

events that led to Fisher's injury, the majority reversed the district court's ruling and remanded the issue to the fact-finder.[345]

In a well-reasoned and highly skeptical dissent, Justice Nelson accused the majority of destroying the concept of foreseeability in Montana tort law by making the concept of duty "as broad as the Butterfly Effect."[346] Decrying the majority's imposition of a legal duty running from Swift to Fisher, Justice Nelson focused on the specific facts surrounding Fisher's injury. Fisher was in fact injured by J & D's negligent handling of the Swift truck, which occurred no less than an hour after Swift's negligence came to a halt and after Swift's driver had relinquished control of his vehicle.[347]

The dissent emphasized the notion that the existence of a legal duty in Montana is predicated on the defendant's ability to reasonably foresee his conduct resulting in an injury to the plaintiff.[348] If a reasonable defendant cannot foresee his actions potentially injuring the plaintiff, or giving rise to a risk from an intervening cause, no duty can exist.[349] The dissent argued that applying the majority's foreseeability standard to the facts surrounding Fisher's injury would require Swift's driver to have reasonably foreseen that

> if he continued in the storm he might come upon other cars and trucks that were stopped on the road because they had been in an accident; that he might hit two of the stopped cars; that a person already at the scene of the accident he was in, but who was not injured in such accident, could well be standing in the road looking at the damage an hour later; and that, while doing so, that person would be injured when an operator of the wrecker clearing the roadway was negligent.[350]

Justice Nelson admonished the majority for extending the concept of duty to encompass anyone who happens to be present at the scene of an accident, regardless of the specific cause of his or her injuries.[351] He argued that, under such a standard, a tortfeasor is subject to infinite liability for any injury any person can imagine resulting from the tortfeasor's ac-

345. *Id.* at 611.

346. *Fisher*, 181 P.3d at 611 (Nelson, J., dissenting). "The Butterfly Effect is the idea that a butterfly stirring the air today in Beijing can transform storm systems next month in New York." *Id.* at n. 1. Justice Nelson hypothesizes that "had the butterfly not flapped its wings, the storm may not have occurred; the first accident may not have happened; Fisher may not have come to investigate it; Swift's driver might not have hit Fisher's patrol car; J & D might not have had to move Swift's truck; J & D's workman might not have carelessly unhooked the trailer; and Fisher would not have been injured by that workman's negligence." *Id.* Under the majority's opinion, "the butterfly is legally required to foresee that flapping its wings would likely result in an accident on Sieben Flats in Montana." *Id.*

347. *Id.* at 612–613.

348. *Id.* at 612.

349. *Fisher*, 181 P.3d at 612.

350. *Id.* at 613.

351. *Id.* at 614.

tions.[352] The dissent concluded that, under a proper application of Montana tort law, Swift would be entitled to summary judgment on both issues of duty and causation.[353]

Taking the majority's opinion to its logical end, the fears of the dissenting justices may very well come to fruition, and tort defendants might be subject to near infinite liability for any negligent act. The *Fisher* concepts of duty and foreseeability appear limited only by an attorney's imagination. Every possible consequence of a negligent action, however remote, may now be reasonably foreseeable. While a party asserting negligence still must prove breach, causation, and damages to the fact-finder, this decision opens the door to trial for a number of negligence claims and comparative negligence defenses that were previously susceptible to summary judgment.

— *Ross Sharkey*

IX. *MONTANA PETROLEUM TANK RELEASE COMPENSATION BOARD V. FEDERATED SERVICE INSURANCE COMPANY*[354]

Montana Petroleum Tank Release Compensation Board v. Federated Service Insurance Company resolved four separate claims by the Montana Petroleum Tank Release Compensation Board ("Board") against various insurance companies.[355] Each of the four cases involved a claim for indemnity by the Board against the insurers of various facility owners, many of them gas stations, for costs incurred cleaning up discharges of petroleum.[356] The district courts uniformly held that the Board failed to file suit within the applicable statute of limitations period, and was therefore precluded from indemnification by the insurance companies.[357] The Board appealed, arguing that the statute of limitations did not toll until its initial request for subrogation was denied by the insurance companies.[358] The four cases were consolidated for the purposes of appeal.[359]

352. *Id.* The dissent notes that under the majority's decision the driver of the Pepsi truck who caused the original accident which Fisher was called to investigate would be subject to a suit seeking contribution. *Id.* at 613 n. 2.

353. *Id.* at 615–616. Under a similar foreseeability analysis the dissent concludes that reasonable minds could not differ in finding that J & D's negligence was an independent intervening cause of Fisher's injury. *Fisher*, 181 P.3d at 615–616.

354. *Mont. Petroleum Tank Release Compen. Bd. v. Federated Serv. Ins. Co.*, 185 P.3d 998 (Mont. 2008).

355. *Id.* at 999.

356. *Id.*

357. *Id.*

358. *Id.* at 999, 1001.

359. *Id.* at 999.

The State of Montana operates the Board, which promptly reimburses facility owners or operators for cleanup costs when petroleum leaks or releases are discovered.[360] The Board oversees the Petroleum Tank Release Cleanup Fund ("Fund"), which distributes funds contributed by various facility owners across the state to facility owners and operators who have incurred clean-up costs for tank leaks or spills.[361] After distributing funds, the Board may seek subrogation from an operator or facility owner's insurance company.[362]

In each of the four underlying actions, the Board made payments to the facility owners and then sought reimbursement from the responsible party's insurance companies.[363] In each case, however, the Board made demands upon the insurance companies more than eight years after it began making payments to the facility owners or operators.[364]

Two years prior to this action, the Montana Supreme Court held in *Montana Petroleum Tank Release Compensation Board v. Capitol Indemnity*[365] that the statute of limitations begins to run when all elements of a claim have accrued.[366] Therefore, *Capitol Indemnity* requires that an insured (or subrogee) file suit within eight years after a claim against their insurer has matured to satisfy the statute of limitations. To obtain subrogation, the Board requested that the Court overrule *Capitol Indemnity* and hold that the statute of limitations for a breach of contract claim begins to run when a court of law is "authorized to accept jurisdiction," relying upon language in Montana Code Annotated Section 27–2–102(1)(a).[367] Under the Board's interpretation of this statute, to satisfy the statute of limitations, an insured must file suit within eight years of a denial of their claim by the insurance company.

The Court upheld the rule of *Capitol Indemnity* and affirmed the summary judgment motions against the Board.[368] The Court recognized that in many situations the rule of *Capitol Indemnity* begins to toll the statute of limitations before a party has standing to sue an insurance company. Judge Warner reasoned, "Of course, it might not make much sense to commence a suit before making a demand on the policies. Moreover, had the facility owners chosen to sue, the lawsuits would be rendered moot if the insurance

360. *Federated Serv. Ins. Co.*, 185 P.3d at 999.
361. *Id.*
362. *Id.*
363. *Id.* at 1000.
364. *Id.*
365. *Mont. Petroleum Tank Release Compen. Bd. v. Capitol Indem.*, 137 P.3d 522 (Mont. 2006).
366. *Id.* at 526.
367. *Federated Serv. Ins. Co.*, 185 P.3d at 1001.
368. *Id.* at 1002.

companies were simply to pay what was due under the policies."[369] The Court justified this rule as it serves to prevent insureds from drawing out claims "endlessly . . . well after the statute of limitations has run."[370]

The Board further argued that a separate period of limitation commences after each reimbursement payment was made by the Board to the facility owners or operators.[371] The Board did not make lump-sum payments to the parties responsible for cleanup of the petroleum, but rather made 575 separate payments.[372] The Board relied upon *St. Paul Fire & Marine Insurance Company v. Thompson*,[373] a case involving an employer seeking indemnification for acts of an employee, in which the Court held that the statute of limitations for an insured against his insurer does not begin to run as of the date of an accident giving rise to a claim, but only after liability is determined.[374] The Court distinguished this case from *Thompson*, reasoning "the facility owners' liability for cleanup was established when the leaks were discovered and the obligation for cleanup occurred."[375]

Therefore, the Court made clear that the statute of limitations begins to toll in a claim for subrogation against an insurer when an obligation to pay under the policy arises.[376] The Court affirmed its decision in *Capitol Indemnity* and further held that separate periods of limitations do not commence after separate payments are made to those obligated to clean up polluted property.[377]

— *Justin P. Stalpes*

X. *BITTERROOT RIVER PROTECTIVE ASSOCIATION, INC. V. BITTERROOT CONSERVATION DISTRICT*[378]

The Montana Supreme Court recently settled the contentious question of whether rivers and streams substantially altered by humans may be accessed for recreational purposes and protected under certain state environmental statutes.[379] In a unanimous opinion, the Court held that once-natural waterways can be accessed by the public for recreational use and protected

369. *Id.* at 1001.
370. *Id.* at 1002.
371. *Id.*
372. *Id.*
373. *Federated Serv. Ins. Co.*, 185 P.3d at 1002.
374. *St. Paul Fire & Marine Ins. Co. v. Thompson*, 451 P.2d 98, 102 (Mont. 1969).
375. *Federated Serv. Ins. Co.*, 185 P.3d at 1002, 1003.
376. *Id.* at 1003.
377. *Id.*
378. *Bitterroot. Protective Assn., Inc. v. Bitterroot Conserv. Dist.*, 198 P.3d 219 (Mont. 2008).
379. *See id.* at 221.

against degradation, even though they might now function largely as a result of human influence.[380] The *Bitterroot River Protective Association, Inc. v. Bitterroot Conservation District* opinion will legitimately extend access and protection to rivers and streams that many thought were off-limits to recreationists or shielded from certain protective statutes.

Bitterroot arose from a controversy involving the Mitchell Slough in Ravalli County, Montana.[381] The Slough diverges from the Bitterroot River at the Tucker Headgate and rejoins the river 16 miles downstream.[382] The Slough has historically been used for irrigation, stockwater, and fish and wildlife.[383] Most of the Slough's water comes from the Bitterroot, but before it rejoins the river, the Slough receives substantial water from irrigation returns and wastewater.[384]

The Slough was first surveyed in 1872.[385] Since then, a number of human changes to the Slough have resulted in rerouting, bed and bank reconstruction, increased water velocities, and manipulation of fish and wildlife habitat.[386] As a result, the Slough is best described as partly human-made and partly natural.[387]

Bitterroot is actually a consolidation of two cases, each brought by the Bitterroot River Protective Association ("Protective Association").[388] In the first case, the Protective Association sought a declaratory judgment against the Bitterroot Conservation District ("Conservation District") declaring that Mitchell Slough was subject to Montana's "310 Law,"[389] which, among other things, requires that "natural rivers and streams and the lands and property immediately adjacent to them are to be protected and preserved to be available in their natural or existing state."[390] The term "stream" is further defined by the 310 Law as "a natural, perennial-flowing stream or river, its bed, and its immediate banks."[391]

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380. *Id.* at 232, 242.

381. *Id.* at 223.

382. *Id.*

383. *Id.*

384. *Bitterroot*, 198 P.3d at 224.

385. *Id.*

386. *Id.*

387. *Id.* at 238.

388. *Id.* at 221.

389. The official name of the Act is "The Natural Streambed and Land Preservation Act of 1975." Mont. Code Ann. § 75–7–101 (2007). However, the Act is commonly known by its original designation as Senate Bill 310. *Bitterroot*, 198 P.3d at 221. The law was enacted pursuant to the Montana Constitution's requirement that "[t]he legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Const. art. IX, § 1(3); *Bitterroot*, 198 P.3d at 227.

390. *Bitterroot*, 198 P.3d at 227 (quoting Mont. Code Ann. § 75–7–102(2)).

391. *Id.* at 227 (quoting Mont. Code Ann. § 75–7–103(6)).

A person intending to alter rivers or streams subject to the 310 Law protections may only do so after obtaining approval from the local conservation district.[392] Based largely on its determination that the Slough would not exist but for human improvements, the Conservation District found in an administrative proceeding that the Slough was not a "natural, perennial-flowing stream" and was not subject to 310 Law protections.[393] The Ravalli County District Court affirmed the administrative decision, and the Protective Association appealed to the Montana Supreme Court.[394]

In the second case, the Protective Association sought declaratory judgment against landowners along the Slough by arguing that the Slough was subject to Montana's Stream Access Law ("Stream Access Law").[395] Under the Stream Access Law, public recreation would be permitted on the Slough, provided the district court found it was:

1. a natural water body,
2. capable of recreational use, and
3. not diverted away from a natural water body through a manmade conveyance system.[396]

The district court, however, concluded Mitchell Slough was not a "natural water body" within the meaning of the Stream Access Law and that, instead, it was a human-made diversion.[397] As a result, the district court held that Mitchell Slough was inaccessible for recreational purposes vis-à-vis the Stream Access Law.[398] The Protective Association appealed the decision to the Montana Supreme Court as well.[399]

Bitterroot, then, consisted of the following distinct inquiries: (1) whether the Mitchell Slough fell within the scope of the 310 Law, and (2) whether it fell within the scope of the Stream Access Law.[400] As described above, each law employed similar but slightly different criteria for whether a body of water fell within its scope.[401] Nevertheless, the gravamen of the questions on appeal could be boiled down to one key question—was the

392. *Id.*

393. *Id.*

394. *Id.* at 221–222.

395. *Id.* at 232–233. The Stream Access Law is located in Montana Code Annotated Sections 23–2–301 to 23–2–322.

396. *Bitterroot*, 198 P.3d at 236.

397. *Id.* at 236, 240–241.

398. *Id.* at 222.

399. *Id.* at 221–222.

400. *Id.* at 222.

401. Under the 310 Law, a waterway is protected if it is a "natural" and "perennial-flowing" stream or river. Mont. Code Ann. § 75–7–103(6); *Bitterroot*, 198 P.3d at 227. On the other hand, under the Stream Access Law, a waterway is protected if it is (1) a natural water body, (2) capable of recreational use, and (3) not diverted away from a natural water body through a manmade conveyance system. Mont. Code Ann. § 75–7–102(2); *Bitterroot*, 198 P.3d at 236.

Mitchell Slough a natural body of water, or was it merely a manmade diversion?[402]

The Montana Supreme Court concluded the Mitchell Slough fell within the protection of both the 310 Law and the Stream Access Law.[403] In terms of the 310 Law, the Court pointed to the law's legislative history in which the Montana Legislature pronounced that State waters "are to be protected and preserved to be available in their *natural, or existing state*, and to prohibit unauthorized projects . . . ."[404] The Court expressed that "virtually all of Montana's waters have been altered or manipulated by man" in some form or another.[405] As a result, to define naturalness in terms of a stream's untrammeled nature is "unworkably narrow."[406] Instead, and in light of the legislative history, a once-natural waterway is protected in its existing state, even if it is no longer purely natural.[407]

Whether or not a stream was once natural and should be protected in its existing state depends on the totality of the circumstances and is a question of fact.[408] The Court held the Slough merited protection under the 310 Law because the Slough's current channel had similar boundaries as its historic course, as depicted in the 1872 survey.[409] The Court rejected the Conservation District's arguments that naturalness should be measured only by the sources of a channel's water and its flow rate, rather than its channel route.[410] Thus irrigation and wastewater diversions to and from the Slough did not imply it was "unnatural."[411] While naturalness is a question of fact, it is an error of law to construe the definition of naturalness too narrowly.[412] The Court's conclusion suggests that a waterway need not be presently natural to qualify for protection under the 310 Law—it must be protected in its existing state (however unnatural that might be) if the totality of the circumstances demonstrates it has some semblance of a previously natural waterway.[413]

That a waterway qualifies for protection under the 310 Law does not automatically imply it qualifies for protection under the Stream Access

402. *Bitterroot*, 198 P.3d at 227–228, 240.
403. *Id.* at 232, 242.
404. *Id.* at 230 (quoting 1975 Mont. Laws 1170) (emphasis in original).
405. *Id.* at 229.
406. *Id.* at 230.
407. *Id.*
408. *Bitterroot*, 198 P.3d at 230.
409. *Id.* at 231–232.
410. *Id.* at 231.
411. *Id.*
412. *Id.* at 232.
413. *Id.* at 230–232.

Law.[414] For recreational access to be granted under the Stream Access Law, a waterway must meet the following elements:

1. a natural water body,
2. capable of recreational use, and
3. not diverted away from a natural water body through a manmade conveyance system.[415]

None of the parties challenged the assertion that the Slough was capable of recreational use.[416] Hunting, boating, and fishing had all historically occurred on the Slough.[417] The landowners challenged the other two criteria, however.[418]

The Montana Supreme Court concluded the Mitchell Slough was a natural water body within the meaning of the Stream Access Law.[419] In reaching this conclusion, the Court employed a similar analysis as it did in analyzing naturalness under the 310 Law.[420] The Court commented that limiting the applicability of the Stream Access Law to waterways that are only "pristine" or that have not been influenced by humans "results in an absurdity."[421] Rather, the important consideration is the extent of human influence.[422] In terms of Mitchell Slough, the sometimes human-induced flow rates and diversions to and from the Slough did not overcome the fact that its current route was similar to that of its historic and natural route.[423]

In a related inquiry, the Court concluded the Mitchell Slough was not a "manmade conveyance system," which would have excluded recreational access under the Stream Access Law.[424] This prong of the analysis required the Court to address the origin and nature of the Slough and its role in conveying water diverted to it by the Bitterroot River through the Tucker Headgate.[425] The Court acknowledged the Slough had been extensively altered by landowners along its course.[426] But, as was the case in terms of its naturalness, the fact that it was man-improved did not mean it was manmade.[427] The Court's conclusion suggests that for a waterway to be considered a manmade conveyance system, its course might literally need to have been cut by man.

414. *Bitterroot*, 198 P.3d at 233.
415. *Id.* at 236.
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.* at 242.
420. *Bitterroot*, 198 P.3d at 235–241.
421. *Id.* at 238.
422. *Id.*
423. *Id.* at 240.
424. *Id.* at 242 (quotations omitted).
425. *Id.* at 240.
426. *Bitterroot*, 198 P.3d at 240–241.
427. *Id.*

The *Bitterroot* opinion admittedly leaves vague parameters as to the definition of naturalness, but it is a step in the right direction—and might be the furthest step a court could legitimately take. As the Court commented, naturalness is ultimately a question for the fact-finder, whether it is a judge or jury. Though Bitterroot did not leave us with a set of factors to consider in determining whether a river or stream is natural, we are left with the assurance that a waterway is not unnatural merely because it is human-influenced. Although the opinion was reached primarily on the basis of statutory construction, the conclusion resonates with the philosophical realization that Man and Nature are not so distinct after all.

— *Randy Tanner*